184

Supreme Court, U.S.
FILED

No. 101145 MAR 15 2011

OFFICE OF THE CLERK

In the

Supreme Court of the United States

JOSEPH R. BANISTER,

Petitioner,

v.

CALIFORNIA BOARD OF ACCOUNTANCY,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

ROBERT G. BERNHOFT, ESQUIRE
Counsel of Record
THE BERNHOFT LAW FIRM, S.C.
207 E BUFFALO STREET, SUITE 600
MILWAUKEE, WI 53202
(414) 276-3333 TELEPHONE
(414) 276-2822 FACSIMILE
rgbernhoft@bernhoftlaw.com

Counsel for Petitioner

March 15, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED ON CERTIORARI

Whether the Following Actions Taken Under California Law Violate the Due Process Clauses of First and Fourteenth Amendments to the United States Constitution Because They Terminate the License-Holder's Property Right in the License Without Due Process:

(a) Disbarring a Certified Public Accountant Based Solely on the Action of a Non-California Agency Where the State of California Did Not Show the Non-California Agency Complied with Due Process of Law;

(b) Disbarring a Certified Public Accountant Based Solely on the Action of a Non-California Agency Where the State of California Did Not Show the Non-California Agency Recognizes Any Right to Practice Comparable to California Law;

(c) Disbarring a Certified Public Accountant Based Solely on the Action of a Non-California Agency Where the State of California Did Not Show that the Actions of the Non-California Agency Were Based on Any Misconduct that could Warrant Disbarment in California.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Joseph R. Banister; and the California Board of Accountancy.

TABLE OF CONTENTS

QUESTIONS PRESENTED ON CERTIORARI . . . i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

ARGUMENT FOR GRANTING WRIT 8

I. THE DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION REQUIRES THE STATE OF CALIFORNIA, BEFORE IT CAN STRIP A LICENSED CALIFORNIA PROFESSIONAL OF HIS RIGHT TO PRACTICE IN CALIFORNIA, WHICH IS A VESTED PROPERTY RIGHT UNDER CALIFORNIA LAW, BASED SOLELY ON THE ACTIONS OF A NON-CALIFORNIA, FOREIGN AGENCY, PROVE THAT THE NON-CALIFORNIA AGENCY RECOGNIZES A SIMILAR "RIGHT TO PRACTICE", IMPOSES COMPARABLE DUE PROCESS STANDARDS, AND ACTED IN ACCORD

WITH THOSE STANDARDS OF DUE PROCESS 9

II. THE CALIFORNIA COURTS HAVE ALREADY RECOGNIZED THAT INTERPRETING SECTION 5100(H) THROUGH ITS PLAIN MEANING FAILS CONSTITUTIONAL SCRUTINY AND CONSEQUENTLY INTERPRETED ADDITIONAL LANGUAGE INTO THE STATUTE. 12

III. BEFORE EVIDENCE OF A PRIOR ADMINISTRATIVE PROCEEDING CAN BE ADMITTED AND USED AS AN ELEMENT OF A SUBSEQUENT PROCEEDING, THE STATE MUST CONDUCT SOME MEANINGFUL REVIEW OF THE PRIOR PROCEEDING'S DUE PROCESS RULES AND APPLICATION OF DUE PROCESS IN THE PRIOR PROCEEDING BEFORE IT CAN BE ADMITTED AS COMPETENT EVIDENCE. 14

IV. STRONG PUBLIC POLICY COMPELS THIS RESULT. 18

V. THE CALIFORNIA OPINION CONFLICTS WITH ESTABLISHED SUPREME COURT AUTHORITY AND FEDERAL CIRCUIT COURT AUTHORITY AND THE LOWER COURT'S NEED GUIDANCE ON HOW MUCH DUE PROCESS IS DUE A PROFESSIONAL LICENSE HOLDER WHEN HE IS DISCIPLINED SOLELY FOR

BEING DISCIPLINED BY A FOREIGN JURISDICTION'S AGENCY. 19

CONCLUSION 21

APPENDIX

Appendix A: Opinion, In the Court of Appeal of the State of California, Third Appellate District (Sacramento) (September 21, 2010) 1a

Appendix B: Judgment Denying Peremptory Writ of Mandamus, Superior Court of California, County of Sacramento (January 8, 2009) 23a

Appendix C: Oral ruling, Excerpt from Reporter's Transcript of Proceedings (December 5, 2008) 28a

Appendix D: Order denying petition for review, In the Supreme Court of California (December 15, 2010) 34a

Appendix E: Decision, California Board of Accountancy, Department of Consumer Affairs, State of California (January 26, 2007) 35a

Appendix F: Proposed Decision, California Board of Accountancy, Department of Consumer Affairs, State of California (November 21, 2006) 37a

TABLE OF AUTHORITIES

CASES

Barry v. Barchi,
443 U.S. 55, 99 S.Ct. 2642 (1979) 9, 15

Bixby v. Pierno,
4 Cal.3d 130 (1971) 10, 15

Butts v. Wyoming State Bd. of Architects,
911 P.2d 1062 (Wyo. 1996) 19

Clare v. State Bd. of Accountancy,
10 Cal.App.4th 294 (1992) 7, 12, 13

Friedman v. Rogers,
440 U.S. 1, 99 S.Ct. 887 (1979) 19, 20

Frink v. Prod,
31 Cal.3d 166 (1982) 10

Gibson v. Berryhill,
411 U.S. 564, 93 S.Ct. 1689 (1973) 19

Halyalkar v. Bd. of Regents,
527 N.E.2d 1222 (N.Y. App. 1988) 19

In re Ruffalo,
390 U.S. 544, 88 S.Ct. 1222 (1968) 19, 20

In Re Thies,
662 F.2d 771 (D.C. Cir. 1980) 19

Marek v. Bd. of Podiatric Medicine,
20 Cal.Rptr.2d 474 (Cal. Dist. Ct. App. 1993) 19

Meyer v. Nebraska,
262 U.S. 390, 43 S.Ct. 625 (1923) 10

Selling v. Radford,
243 U.S. 46, 37 S.Ct. 377 (1917) 20, 21

United States v. Mendoza-Lopez,
481 U.S. 828, 107 S.Ct. 2148 (1987) .. 15, 16, 17

Zuckerman v. State Bd. of Chiropractic Examiners,
29 Cal.4th 32 (2002) 9, 15

CONSTITUTIONS

U.S. Const., Amendment V 2, 9

U.S. Const., Amendment XIV 2, 9

Cal. Const., art. 1, § 7, subd. (a) 9

Cal. Const., art. III, § 3.5 6

STATUTES

28 U.S.C. § 1257 1

28 U.S.C. § 2106 1

Cal. Bus. Prof. Code § 5100 ..... 2, 10

Cal. Bus. Prof. Code § 5100(c) 11

Cal. Bus. Prof. Code § 5100(h) 12, 13

Cal. Civ. Proc. Code § 1094.5(b) 8

OPINIONS BELOW

The Order denying review from the Supreme Court of the State of California is unpublished and is dated December 15, 2010. A copy of this Order is included in the Appendix at Appendix D at 34a. The California Court of Appeals, Third District, issued an Opinion on September 21, 2010. This Opinion is unpublished, but can be found on Westlaw at 2010 WL 3639303. The Opinion is included in the Appendix at Appendix A at 1a. The Superior Court of California for the County of Sacramento issued a final Judgment on January 8, 2009. This Judgment was unpublished and is included in the Appendix at Appendix B at 23a. The Superior Court's Judgment incorporated by reference the oral decision made by the Superior Court at a hearing held on December 5, 2008. The transcript of that proceeding is included in the Appendix at Appendix C at 28a. Finally, the administrative law judge issued a Proposed Decision on November 21, 2006 which can be found in the Appendix at Appendix F at 37a. That Proposed Decision was adopted by the California Board of Accountancy on January 26, 2007. The Decision adopting the administrative law judge's Proposed Decision can be found in the Appendix at Appendix E at 35a.

JURISDICTION

The California Supreme Court denied Banister's Petition for Review on December 15, 2010. (Appendix at Appendix D at 34a.) This Petition for Writ of Certiorari is filed within 90 days of the Order denying review which exhausted all remedies in California. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1257 and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

* * * * *

U.S. Const., Amendment XIV

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

* * * * *

Cal. Bus. Prof. Code § 5100.

Section 5100 reads in its entirety:

> After notice and hearing the board may revoke, suspend, or refuse to renew any permit or certificate granted under Article 4 (commencing with Section 5070) and Article 5 (commencing with Section 5080), or may censure the holder of that permit or certificate for unprofessional conduct that includes, but is not limited to, one or any combination of the following causes:
>
> (a) Conviction of any crime substantially related to the qualifications, functions and duties of a

certified public accountant or a public accountant.

(b) A violation of Section 478, 498, or 499 dealing with false statements or omissions in the application for a license, in obtaining a certificate as a certified public accountant, in obtaining registration under this chapter, or in obtaining a permit to practice public accountancy under this chapter.

(c) Dishonesty, fraud, gross negligence, or repeated negligent acts committed in the same or different engagements, for the same or different clients, or any combination of engagements or clients, each resulting in a violation of applicable professional standards that indicate a lack of competency in the practice of public accountancy or in the performance of the bookkeeping operations described in Section 5052.

(d) Cancellation, revocation, or suspension of a certificate or other authority to practice as a certified public accountant or a public accountant, refusal to renew the certificate or other authority to practice as a certified public accountant or a public accountant, or any other discipline by any other state or foreign country.

(e) Violation of Section 5097.

(f) Violation of Section 5120.

(g) Willful violation of this chapter or any rule or regulation promulgated by the board under the authority granted under this chapter.

(h) Suspension or revocation of the right to practice before any governmental body or agency.

(i) Fiscal dishonesty or breach of fiduciary responsibility of any kind.

(j) Knowing preparation, publication, or dissemination of false, fraudulent, or materially misleading financial statements, reports, or information.

(k) Embezzlement, theft, misappropriation of funds or property, or obtaining money, property, or other valuable consideration by fraudulent means or false pretenses.

(l) The imposition of any discipline, penalty, or sanction on a registered public accounting firm or any associated person of such firm, or both, or on any other holder of a permit, certificate, license, or other authority to practice in this state, by the Public Company Accounting Oversight Board or the United States Securities and Exchange Commission, or their designees under the Sarbanes-Oxley Act of 2002 or other federal legislation.

(m) Unlawfully engaging in the practice of public accountancy in another state.

STATEMENT OF THE CASE

Joseph R. Banister ("Banister") has been continually licensed to practice accounting in California since 1991. (Appendix at Appendix F at 38a.)[1]

Banister had an exemplary record during his tenure as a licensed California Certified Public Accountant, as no one had ever filed a single complaint against him and no disciplinary actions have ever been taken against Banister before the current matter. (Appendix at Appendix F at 40a.)

The California Board of Accountancy (the "Board") filed an Accusation against Banister seeking the revocation of Banister's California license to practice accountancy. (Appendix at Appendix F at 38a.) The only surviving charge against Banister was that Banister had been prohibited by another agency, the Internal Revenue Service ("IRS"), from appearing before it to represent taxpayers in tax disputes. *Id.* Furthermore, the "complainant has not shown evidence of other professional misconduct by respondent." *Id.*

The Board held a hearing on the Accusation before the Honorable administrative law judge, Steven C. Owyang ("ALJ"). At the hearing, the only question before the ALJ was whether the IRS prohibited Banister from representing taxpayers before the IRS. (Appendix at Appendix F at 41a-42a.)

---

[1] The Factual Findings in the Proposed Order going to Banister's background have not been challenged on appeal.

The specific allegations of due process violations in the IRS proceeding raised at the ALJ's hearing were summarily denied. The ALJ did not consider the Constitutional due process questions when it ruled: "[Banister] raises various constitutional law concerns, including the due process provisions of the United States and California constitutions. He asserts there was a 'manifest lack of due process' in the federal proceedings against him. This decision determines no issues of constitutional law." (Cal. Const., art. III, § 3.5.)" (Appendix at Appendix F at 43a.) The ALJ determined that Banister had been prohibited from representing taxpayers directly before the IRS and ordered Banister's license to practice accounting be revoked solely on those grounds. (Appendix at Appendix F at 45a.)

The case proceeded to the Superior Court of California for the County of Sacramento (the "Superior Court") where Banister filed a Writ of Mandate pursuant to Cal. Code of Civ. P. § 1084. Banister raised the same constitutional arguments before the Superior Court in the summary judgment proceedings and at the hearing held on December 8, 2008, and the Superior Court denied review of those arguments. (Appendix at Appendix C at 33a.) The Court articulated Banister's contentions: "This Court recognizes that there's a property interest [for license holders] which gives rise to due process." (Appendix at Appendix C at 30a.) "[Banister] would like to, from the Court's perspective collaterally attack the decision of the Internal Revenue Service in effect requiring the Board of Accountancy to evaluate the trustworthiness of the IRS decision. The failure or lack of compliance

with due process in the context of that decision." (Appendix at Appendix C at 30a.)[2]

Banister appealed this decision to the California Court of Appeals, Third District. The same argument was made again in Banister's Opening and Reply briefs. The final opinion dealt with this issue:

> Undetered by a decision expressly upholding the constitutionality of subdivision (h), [referring to *Clare v. State Bd. of Accountancy*, 10 Cal.App.4th 294 (1992),] Banister tries to use Clare to his advantage. He points to the court's willingness to imply a legislative intent not found in the express terms of the statute in order to save it. In similar fashion, he posits that the Legislature must have intended that the Board would scrutinize other governmental agency proceedings to assure they comported with the due process expectations of California licensees. There are no cases to support the imposition of such an expansive sua sponte obligation on the Board. But more to the point, neither the language of the statute nor the

---

[2] Banister disagrees that he was collaterally attacking the IRS Decision because the IRS Decision would stand no matter how the California courts handled this issue. This was primarily an evidentiary question: Does the Due Process Clause require a court or agency acting in a judicial capacity to inquire (as a preliminary evidentiary question going to admissibility) about the trustworthiness of a foreign agency's disciplinary decision before the fact of that discipline is used against a person to take away a vested property right in a professional license?

> dearth of evidence presented in this record justifies such an expansion here.

(Appendix at Appendix A at 16.)

Finally, Banister sought for this case to be reviewed by the California Supreme Court, but that review was denied on December 15, 2010. (Appendix at Appendix D, p. 34a.)

ARGUMENT FOR GRANTING WRIT

The lower courts erred when they held that neither Cal. Civ. Proc. Code § 1094.5(b) nor the due process clause of the California Constitution nor the due process clauses of the United States Constitution prohibit California from using the actions of a non-California, foreign agency to disbar a professional licensed under California law without proving: first, that the non-California, foreign agency recognizes a right to practice comparable to California law; second, that the non-California, foreign agency took any prohibitive action toward a California professional based on reasons analogous to those permitting disbarment under California law; and, third, that the non-California, foreign agency imposes rules of due process and applied those rules of due process in any prohibitive action taken against the California professional.

I. THE DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION REQUIRES THE STATE OF CALIFORNIA, BEFORE IT CAN STRIP A LICENSED CALIFORNIA PROFESSIONAL OF HIS RIGHT TO PRACTICE IN CALIFORNIA, WHICH IS A VESTED PROPERTY RIGHT UNDER CALIFORNIA LAW, BASED SOLELY ON THE ACTIONS OF A NON-CALIFORNIA, FOREIGN AGENCY, PROVE THAT THE NON-CALIFORNIA AGENCY RECOGNIZES A SIMILAR "RIGHT TO PRACTICE", IMPOSES COMPARABLE DUE PROCESS STANDARDS, AND ACTED IN ACCORD WITH THOSE STANDARDS OF DUE PROCESS

There is no question that, in California, the holder of a professional license has a vested property interest in the right to practice his profession and that right cannot be taken from him without due process. *Zuckerman v. State Bd. of Chiropractic Examiners*, 29 Cal.4th 32, 43 (2002). There is also no dispute that the United States Constitution and the California Constitution demand that property rights to practice a profession cannot be removed without affording due process protection. *See Barry v. Barchi*, 443 U.S. 55, 64, 99 S.Ct. 2642 (1979) ("As a threshold matter, therefore, it is clear that Barchi had a property interest in his [horse trainer's] license sufficient to invoke the protection of the Due Process Clause."); *see also* U.S. Const. amend. V and XIV; Cal. Const., art. 1, § 7, subd. (a). Both the United States Supreme Court and the California Supreme Court have recognized the requirement of due process protection. "The right to practice one's profession is sufficiently

precious to surround it with a panoply of legal protection." *Bixby v. Pierno*, 4 Cal.3d 130, n.12 (1971). The right "to engage in any of the common occupations of life" is a liberty protected by the Fourth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625 (1923). *See also Frink v. Prod*, 31 Cal.3d 166, 174-75 (1982) (referring to this right as fundamental).

The California Board of Accountancy, as the original complainant agreed that the "right to practice accountancy in California concerns a vested property right." (Appendix at Appendix F at 43a.) Yet the Board deprived Banister of his fundamental property right to practice accounting in the State of California by doing an "end-run" around the due process protections required by both the United States and California constitutions. The Board revoked Banister's license based solely on the actions of another agency whose own actions the state of California failed to prove provided any due process protections, recognized any analogous right to practice (as a property right rather than just a privilege), or took any action adverse to Banister for any reason permitting disbarment under California law for California professionals. A statute cannot be written or applied to eviscerate a citizen's constitutional rights.

From a reading of Cal. Bus. Prof. Code § 5100, the California Legislature recognizes the importance of a license to practice, the seriousness of attempts to revoke a license, and the need to afford licensees due process protections before revocation. Further, if the Board had independently wanted to revoke Banister's license, the Board would have had to accuse Banister based on the conduct underlying the accusations in the

IRS complaint and base the revocation on § 5100(c).[3] If the Board wanted to revoke Banister's license based on § 5100(c), the Board would have had to hold hearings to prove the underlying facts and would have had to provide the IRS recognized an analogous right to practice as California law afforded its professionals, accorded all of its practitioners the same due process rights, and had, in fact, protected and provided Banister all his due process protections that the IRS failed to provide. California could not do so because the IRS does not recognize any "right" to practice before it, does not afford due process to any practitioner before it, and did not do so for Banister, in particular. The discussion in the administrative law judge's Proposed Decision compares the California statute referring to the "right to practice" to the Internal Revenue Service's "authority to practice." (Appendix at Appendix F at 43a.) This, and this alone, warrants reversal, unless precarious precedents be set that non-California foreign agencies can take adverse actions against California professionals, and thereby, automatically strip them of their right to practice in California for reasons that do not permit disbarment in California and contrary to core Constitutional rights of due process.

---

[3] It should be noted that there has been no indication that the Board had any intention of revoking Banister's license absent the actions of the IRS. The record shows there have been no complaints filed against Banister or any other disciplinary action by the Board. (Appendix at Appendix F at 40a.) In fact, the Board was unaware of any issues or the IRS actions against Bannister before Banister himself informed the Board of the IRS actions. (Appendix at Appendix F at 45a.)

II. THE CALIFORNIA COURTS HAVE ALREADY RECOGNIZED THAT INTERPRETING SECTION 5100(H) THROUGH ITS PLAIN MEANING FAILS CONSTITUTIONAL SCRUTINY AND CONSEQUENTLY INTERPRETED ADDITIONAL LANGUAGE INTO THE STATUTE.

California Courts have already determined that § 5100(h) cannot be given its plain meaning. In *Clare v. State Board of Accountancy*, 10 Cal.App.4th 294 (1992), the California Court of Appeals found that § 5100(h) could not be given plain meaning and that § 5100(h) could only be applied in ways that did not violate the intent of the legislature or constitutional protections.

In *Clare*, the Board moved to revoke the *Clare* Petitioner's ("Clare") license by applying § 5100(h) after Clare's practice before a federal agency was suspended. *Id.* at 299-300. Clare contested the application of § 5100(h) contending it was unconstitutional on its face by noting that applying the plain meaning of § 5100(h) meant an individual could lose his license for trivial reasons such as "a failure to pay fees" or for unconstitutional reasons such as "the accountant's race." *Id.* at 303.

In response to Clare's contention, the California Court of Appeals noted that it must "adopt an interpretation that, consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality." *Id.* at 303. The court reviewed the statute as a whole and concluded that the plain meaning of § 5100(h) could not be applied in all

cases. The court added the requirement that § 5100(h) could only be applied when there was a *substantial relationship* between the suspension by the federal agency and the licensee's fitness to practice. *Id.* The court recognized that even though the plain language of § 5100(h) did not require a substantial relationship, it was clear from the statute as a whole that the legislature did not intend for a license to be revoked for trivial or unconstitutional reasons. "Despite the omission of an explicit requirement of a 'substantial relationship' in subdivision [(h)] we also conclude the Legislature intended such a requirement." *Id.* at 302. Furthermore, "[t]hese hypothetical circumstances are avoided in light of the 'substantial relationship' requirement we conclude is implicitly contained in subdivision [(h)]." *Id.* at 303. Banister asked the California courts and the administrative agency to recognize, in a similar manner as the Appeals Court in *Clare*, that the Legislature could not have intended to provide the Board a "back door" to deprive a licensee his fundamental due process rights guaranteed by both the United States and California constitutions. Nor should this Court allow such an interpretation to continue in California.

Although *Clare*'s "substantial relationship" test protects against utilizing non-California-agency revocations that were based on unconstitutional reasons underlying the suspension (i.e., Clare's race-discrimination example), the "substantial relationship" test fails to protect against deficiencies in the non-California-agency proceeding affecting a licensee's fundamental due process rights. In other words, where the merits underlying a federal agency revocation would be considered either totally unrelated to the practice of accountancy under California law, or

would be considered an unconstitutional bases for disciplining the accountant, then *Clare*'s "substantial relationship" test protects the accountant from a license revocation based on an unconstitutional reason. On the other hand, *Clare*'s "substantial relationship" test fails to address fundamental due process violations occurring in a federal revocation proceeding (which would otherwise cast doubts on the veracity of the proceeding's results) because the relationship test only looks at the conduct underlying the merits of the federal proceeding and does not look at the process in any way, shape, or form. And the ALJ failed in this exact manner when he held: "Respondent raises various constitutional law concerns, including the due process provisions of the United States and California constitutions. He asserts there was a '***manifest lack of due process***' in the federal proceedings against him. This decision determines no issues of constitutional law." (Proposed Decision, p. 4) (emphases added).

III. BEFORE EVIDENCE OF A PRIOR ADMINISTRATIVE PROCEEDING CAN BE ADMITTED AND USED AS AN ELEMENT OF A SUBSEQUENT PROCEEDING, THE STATE MUST CONDUCT SOME MEANINGFUL REVIEW OF THE PRIOR PROCEEDING'S DUE PROCESS RULES AND APPLICATION OF DUE PROCESS IN THE PRIOR PROCEEDING BEFORE IT CAN BE ADMITTED AS COMPETENT EVIDENCE.

The use of the mere fact of a prior adjudication as an element of another cause of action has been most fully developed in the criminal law with regard to

crimes that have, as an element of the offense, the fact of a prior conviction. Consequently, this area of law constitutes an excellent source of persuasive authority as it affects how this case should be considered. This Court has held that when the use of the mere fact of a prior administrative hearing is an element of a criminal offense, "there must be *some* **meaningful** review of the administrative hearing." *United States v. Mendoza-Lopez*, 481 U.S. 828, 838, 107 S.Ct. 2148 (1987) (italics in original, bolding emphasis added). "If the statute envisions that a court may impose a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with the constitutional requirement of due process." *Id.* at 837 (emphasis in original). Where fundamental rights are at issue, due process under the Fifth and Fourteenth Amendments require review of the prior process to collaterally challenge the use of that prior proceeding.

Mendoza-Lopez involved a fundamental right – liberty – just as Banister's revocation hearing involved a fundamental property right under California law. *See Zuckerman*, 29 Cal.4th 32 and *Bixby*, 4 Cal.3d 130. The *Mendoza-Lopez* rule should be extended to California administrative proceedings for two significant reasons. First, in Banister's revocation hearing, the fact of the prior revocation was the *only* element of the alleged offense, which should heighten the scrutiny of that proceeding because Banister's conduct cannot be independently considered; and, second, federal law affords procedural due process protections to merely *expectations* of licensure interests. *Barry*, 443 U.S. at 64 n.11 ("[S]tate law has engendered a clear expectation of continued enjoyment

of a license absent proof of culpable conduct by the trainer. Barchi, therefore, has asserted a legitimate claim of entitlement . . . that he may invoke at a hearing." (internal quotations omitted)). Therefore, even if Banister's CPA license would not be considered a fundamental property right, which it is, the fact that Banister has a significant interest and expectation in the license independently guarantees his federal rights to due process.

Furthermore, the specific due process deprivation in *Mendoza-Lopez* does not limit consideration of procedural due process in Banister's case. In *Mendoza-Lopez*, the prior administrative hearing at issue was a deportation hearing before the Immigration and Naturalization Service ("INS"). *Mendoza-Lopez*, 481 U.S. at 830. The specific due process deprivation alleged by the *Mendoza-Lopez* defendant at the prior INS hearing was the defendant's unknowing waiver of his appeal rights. *Id.* at 831. Like Banister's situation, the merits of the underlying prior administrative hearing were not at issue before the subsequent reviewing court, nor was it undisputed that the *Mendoza-Lopez* defendant had notice that returning to the United States would subject them to federal felony charges. *Id.* at 830; *see also* the dissenting opinion at *id.* at 842 (Rehnquist, C.J. *dissenting*). A meaningful review of the prior administrative hearing's procedures does not require any analysis, *de novo* or otherwise, of the administrative determination's merits.

Mendoza-Lopez also does not define the limits of due process procedural deficiencies eligible for subsequent review. The defendant in *Mendoza-Lopez* alleged he was deprived of his appellate rights because

his waiver lacked full knowledge of its effects. *Id.* at 831. As to Banister's case, Banister was not deprived of any appellate rights. In fact, Banister's right to appeal did not expire until June of 2010. Banister did appeal to the federal district court.[4] The Supreme Court declined to define the metes and bounds of any collateral challenge rule: "We decline at this stage to enumerate which procedural errors are so fundamental that they may functionally deprive the alien of judicial review." *Id.* at 839, n.17. The footnote went on to give examples: "use of coerced confession, adjudication by a biased judge[,]" "mob violence," and "knowing use of perjured testimony[.]" *Id.* (citations found in case parentheticals).

In Banister's case, the IRS ALJ denied Banister any discovery, denied him the right to testify on his own behalf as to liability, denied him the opportunity to present witnesses, denied him the opportunity to issue subpoenas, limited his cross-examination, and finally, limited Banister's oral argument at the sentencing hearing. *See* Appendix at Appendix A at 5a-8a (setting forth the areas of due process failures in the original Internal Revenue Service proceeding). A meaningful review of the procedures of the federal administrative hearing are appropriate in this case and are well within the administrative agencies adjudicative ability.

---

[4] The United States Federal District Court for the Northern District of California dismissed the appeal on Summary Judgment on March 10, 2010, and Banister will be appealing that Judgment to the United States Court of Appeals for the Ninth Circuit. The district court case was styled *Joseph R. Banister v. Department of the Treasury, et al.*, Case No. 5:10-cv-02764-JW (N.D. Cal.).

IV. STRONG PUBLIC POLICY COMPELS THIS RESULT.

Imagine a California professional being disbarred by the nation of Iran because of his ethnicity from practicing before their agencies. Under the precedent set in California, the state of California could then automatically disbar the California professional solely on those grounds. Imagine an agency in another state disbarring a practitioner because of his sexual preference or non-traditional religious beliefs. Under the precedent set in California, the state of California could then automatically disbar the California professional solely on those grounds. Imagine another agency in another state or foreign nation disbarring a professional for purely political reasons. Under the precedent set in California, the state of California could then automatically disbar the California professional solely on those grounds, and did exactly that here.

The right to practice vests rights and expectations in practicing professionals. Using a foreign agency's actions based solely on a foreign agency's laws, a foreign agency's rules, and a foreign agency's actions, without regard to any of the rules, limitations or law of California, makes a mockery of California's extensive and expansive protection of the rights of practitioners under California law. Put simply, this precedent cannot stand if the laws of California, and the Constitutional rights of its citizens, are to mean anything.

V. THE CALIFORNIA OPINION CONFLICTS WITH ESTABLISHED SUPREME COURT AUTHORITY AND FEDERAL CIRCUIT COURT AUTHORITY AND THE LOWER COURT'S NEED GUIDANCE ON HOW MUCH DUE PROCESS IS DUE A PROFESSIONAL LICENSE HOLDER WHEN HE IS DISCIPLINED SOLELY FOR BEING DISCIPLINED BY A FOREIGN JURISDICTION'S AGENCY.

This Court has held repeatedly that professional license holders have a federal due process property interest in their professional licenses. *Friedman v. Rogers,* 440 U.S. 1, 99 S.Ct. 887 (1979); *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1689 (1973); *In re Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222 (1968). Lower courts, however, have experienced great difficulty in determining the precise level of process due in professional license discipline cases. In particular, state courts of review and federal circuit courts of appeal have expressed sharp disagreement about the level of process due in professional disciplinary proceedings based upon disciplinary action taken in other jurisdictions. *See, e.g., In Re Thies,* 662 F.2d 771 (D.C. Cir. 1980) (reversing on due process grounds a Tax Court disbarment solely on the basis of a state court disbarment); *Marek v. Bd. of Podiatric Medicine,* 20 Cal.Rptr.2d 474, 479 (Cal. Dist. Ct. App. 1993) ("[P]etitioner's inability to offer evidence in rebuttal to those charges did not deny petitioners any constitutional right to a full and fair hearing before the California Board."); *Butts v. Wyoming State Bd. of Architects,* 911 P.2d 1062, 1066 (Wyo. 1996) (holding that Wyoming agency not required "to prove the underlying basis for Kentucky's action against [the

license holder]"); *Halyalkar v. Bd of Regents,* 527 N.E.2d 1222 (N.Y. App. 1988) (holding that a stipulated consent order in one state cannot be used as evidence in a New York disciplinary proceeding). This Court should accept certiorari to resolve the inconsistency in the lower courts' decisions on the issue presented.

A Supreme Court decision in this matter also is necessary to clarify an important question of law which has not been, but should be, settled by this Court. This Court has held that professional license-holders are entitled to due process protection. *Friedman v. Rogers,* 440 U.S. at 18; *In re Ruffalo,* 390 U.S. at 551. The lower courts, however, are in need of guidance as to the requisite level of process in disciplinary proceedings. Particularly, this Court should clarify whether professional license-holders are entitled to review of underlying facts and procedure before reactionary discipline is imposed based on action in other jurisdictions. As noted just above, this issue appears to be recurring in the lower courts, and producing disparate results.

Finally, this Court should accept certiorari because the decisions of the California appellate courts affirming the California Board of Accountancy's Final Decision are in conflict with controlling precedent issued by this Court. In *Selling v. Radford,* 243 U.S. 46, 37 S.Ct. 377 (1917), this Court addressed the analogous issue of the level of inquiry a federal court must conduct before disbarring an attorney based upon disbarment in a state court of last resort. The Court concluded, in conflict with the recent opinions of the California appellate courts, that due process

requires more than simply reacting to a state court finding of unfitness. *Id.* at 50.

CONCLUSION

For all of the foregoing reasons, this Court should grant Banister's Petition for Writ of Certiorari. California and other States need instruction on this important area of law, especially as cross-jurisdictional professional practices become more common and prevalent. Differing standards of federal due process by the States and federal agencies in disciplinary proceedings will leave professionals disparately treated throughout the country, and will inevitably face the forfeiture of their vested property rights in their licenses without due process of law. The fix in this case is easy. Prior to accepting the certification of a foreign-agency's disciplinary hearing, due process requires that the agency establish that the proceeding underlying that discipline conformed to due process in such a way to protect the property rights, not in such a way to protect a mere privilege, as the Internal Revenue Service treated Banister's ability to practice in that underlying disciplinary proceeding.

Dated: March 15, 2011.

By: Robert G. Bernhoft, Esquire
Counsel of Record
Wis. State Bar No. 1032777
THE BERNHOFT LAW FIRM, S.C.
207 East Buffalo Street, Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333 telephone
(414) 276-2822 facsimile
rgbernhoft@bernhoftlaw.com

Counsel for the Petitioner,
Joseph R. Banister

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Opinion, In the Court of Appeal of the State of California, Third Appellate District (Sacramento) (September 21, 2010) 1a

Appendix B: Judgment Denying Peremptory Writ of Mandamus, Superior Court of California, County of Sacramento (January 8, 2009) 23a

Appendix C: Oral ruling, Excerpt from Reporter's Transcript of Proceedings (December 5, 2008) 28a

Appendix D: Order denying petition for review, In the Supreme Court of California (December 15, 2010) 34a

Appendix E: Decision, California Board of Accountancy, Department of Consumer Affairs, State of California (January 26, 2007) 35a

Appendix F: Proposed Decision, California Board of Accountancy, Department of Consumer Affairs, State of California (November 21, 2006) 37a

APPENDIX A

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

C062435
(Super. Ct. No. 07CS00379)

[Filed September 21, 2010]

JOSEPH R. BANISTER,	)
	)
Plaintiff and Appellant,	)
	)
v.	)
	)
CALIFORNIA BOARD OF ACCOUNTANCY,	)
	)
Defendant and Respondent.	)
	)

As provided in Business and Professions Code section 5100, subdivision (h), the California Board of Accountancy (Board) revoked petitioner Joseph R. Banister's accounting license because he had been disbarred by the Internal Revenue Service (IRS) and

the grounds for the disbarment were substantially related to the qualifications, functions, or duties of an accountant. (*Clare v. State Bd. of Accountancy* (1992) 10 Cal.App.4th 294 (*Clare*).) In his petition for a writ of mandate, Banister alleges the IRS denied him the kind of due process he would be entitled to receive in California revocation proceedings of his vested property right to practice accounting. On appeal, he contends, in essence, the Board has a sua sponte obligation to scrutinize the federal proceedings to determine whether he was accorded due process as required to revoke his license in California. The failure to examine the federal proceedings, in Banister's view, constitutes an unconstitutional application of subdivision (h). We disagree and affirm the judgment.

LEGAL, PROCEDURAL, AND FACTUAL CONTEXT

The IRS disbarment is the sole basis for the revocation of Banister's license. The record of the IRS proceedings discloses that Banister admitted the conduct for which he was disbarred. He self-reported the disbarment to the Board. There is no evidence of any client complaints or other disciplinary proceedings.

Business and Professions Code section 5100 provides, in pertinent part: "After notice and hearing the board may revoke, suspend, or refuse to renew any permit or certificate . . . or may censure the holder of that permit or certificate for unprofessional conduct that includes, but is not limited to, one or any combination of the following causes: [¶] . . . [¶] (h)

Suspension or revocation of the right to practice before any governmental body or agency."[1]

The Record of the IRS Proceedings

On March 19, 2003, the Director of the IRS's Office of Professional Responsibility filed a formal complaint alleging that Banister had committed misconduct by giving advice that had no basis in law or fact; by knowingly counseling clients to illegally evade federal taxes; by providing false opinions to taxpayers; by failing to exercise due diligence in making representations to taxpayers; and by signing federal income tax returns that did not have a realistic possibility of being sustained on their merits. All of the charges involved Banister's advice to clients not to report income on their federal tax returns. Based on these allegations, Banister faced disbarment from practicing before the IRS.

The decision of the IRS administrative law judge (ALJ) granting summary judgment indicates that Banister, in his answer, admitted the facts alleged in the complaint.[2] Based on those admissions, ALJ Moran found that each of the offenses had been established by clear and convincing evidence and granted the Director's motion for summary judgment. He explained, as quoted in the "Decision on Appeal": "'A fundamental purpose of a hearing or trial is to determine whether the allegations of fact, as set forth

---

[1] Business and Professions Code section 5100, subdivision (h) will be referred to simply as "subdivision (h)" throughout this opinion.

[2] Banister did not provide a copy of his answer for the record. He has not challenged the ALJ's assertion.

in the Complaint, occurred. But where there is no dispute as to the underlying facts, obviously there is no need for a court to resolve whether one party's version of the facts is more believable than the other side's version. That is what happened in this case. In fact, in Mr. Banister's answer to the original Complaint he *admitted* that the facts alleged in the Complaint occurred. Thus, Mr. Banister *admitted* that he so advised his client "C" that the Sixteenth Amendment to the United States Constitution was not ratified and he *admitted* that he advised client "C" that Internal Revenue Code sections 861 through 865 defined "source of income" so as to exclude C's earnings. Similarly, Banister *admitted* that he also advised client "T" that Internal Revenue Code sections 861 through 865 defined "source of income" so as to exclude T's earnings. The very significant problem with Banister's advice is that it is absolutely wrong. Both of Banister's assertions have been long resolved by the Federal Courts as completely without merit. Thus, Banister was not presenting some new theory in support of the dream entertained by some United States citizens that somehow they don't have to pay their federal income taxes. In fact, Banister's assertions have been addressed by so many federal courts that they are no longer accorded the dignity of repeating the explanations as to why the claims are meritless. Accordingly, with no factual dispute as to the allegations in the original Complaint, and having determined as a matter of law that such advice to clients "T" and "C" constituted misconduct and disreputable conduct under the regulatory sections cited in the Complaint, the court directed summary judgment in favor of the IRS.'"

Following the ruling, Banister was accorded a hearing on December 1, 2003, to determine the appropriate penalty and was thereafter disbarred from practice before the IRS.

Banister then appealed to the Secretary of the Treasury, based on the purported denial of due process. He alleged the ALJ denied him the right to call witnesses or to testify on his own behalf. In an exhaustive 104-page analysis, David O'Connor, special counsel to the senior counsel as the authorized delegate of John W. Snow, Secretary of the Treasury, rejected Banister's due process arguments, among others, affirmed the ALJ's findings with respect to the charges contained in the initial complaint, and affirmed the decision to disbar Banister from practice before the IRS. We quote at length the pertinent analysis of Banister's sweeping due process allegations, both because the special counsel's analysis is apt and thorough and because Banister has not provided a record containing any evidence to the contrary.

Right to Discovery. "[Banister] claims that his rights of discovery with respect to documents and witnesses have been abridged. [He] has not indicated all that he seeks to include within this sweeping claim . . . . [His] requests to present witness testimony, introduce documents, or gain discovery were often untimely (prejudicially so with respect to both Complainant and Judge Moran's efforts to conduct orderly proceedings) and often made on the basis of not even the most minimal showings of relevance of materiality, let alone with the type of particularity required by the court in United States v. Willie [(10th Cir. 1991) 941 F.2d 1384]."

Denial of the Right to Testify. "[Banister] claims that he was denied his right to testify. Judge Moran, in no uncertain terms . . . has flatly denied this claim: [¶] '[Banister] was permitted to offer any evidence he could muster to rebut the charges set forth in the Complaint and the Amended Complaint. As this decision reflects, he was also given the opportunity to offer any factors for the Court to consider, in mitigation of the violations, in determining the appropriate sanction.'

"While [Banister] has again failed to provide any specifics in support of another broad claim, it would seem that his assertion is premised on what he believes to be the unfairness embodied in his possible loss of the Fifth Amendment privilege against self incrimination if he testifies in these proceedings and in certain of the evidentiary exclusions arising from Judge Moran's determinations of irrelevance and immateriality. . . .I would also note that Judge Moran did everything he could to address even these concerns by allowing [Banister] to submit his unsworn statement at the December 1, 2003 hearing and refusing to allow Complainant's counsel to cross-examine him with respect to that statement or any other matters relevant to these proceedings."

Right to a Hearing. "[N]o constitutional right to procedural due process precluded the resolution of the liability issues in these proceedings through motion for summary judgment if the charges before Judge Moran did not involve disagreements with respect to relevant and material facts."

"Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate where

there are no genuine issues as to any material fact and when the moving party is entitled to judgment as a matter of law. Similar standards apply in the context of disciplinary proceedings under Treasury Circular 230. [Citation.] These standards are in accord with decisions such as Puerto Rico Aqueduct and Sewer Authority v. United States Environmental Protection Agency, 35 F.3d 600, 606 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (1995), which find that there is no constitutional due process right to an evidentiary hearing absent an actual dispute as to a material fact.

"As to the fundamental underlying facts pertaining to the charges contained in the Initial Complaint, Judge Moran has found that [Banister] has admitted the underlying facts with respect to liability and has been accorded a hearing on all matters pertaining to the sanction to be imposed with respect to that conduct. I agree."

Right to Call Witnesses. The special counsel, O'Connor, analyzed the relevancy and materiality of each of the witnesses Banister hoped to call to testify. As to some of the witnesses, Banister missed the deadline for identifying them. Moreover, as to some of these and others, Banister failed to provide specifics that would have permitted the ALJ to determine if their testimony would be relevant. Other witnesses' testimony would have been irrelevant and/or immaterial. Others would have been duplicative.

There is no evidence in the record that Banister appealed the Secretary of the Treasury's decision to affirm Banister's disbarment before the IRS. He asserted he was planning to appeal within the six-year

statute of limitations. The United States Treasury affirmed the disbarment on June 25, 2004.

The Record of the California Administrative Proceedings

On February 25, 2005, the Board filed an accusation against Banister alleging that his license should be revoked based on the revocation of his right to practice before the IRS. At the hearing, Banister challenged the IRS proceeding, asserting a lack of due process in that he was not allowed to conduct discovery, to subpoena witnesses, to testify under oath, or to fully cross-examine any witnesses. He did not, however, introduce any evidence at the hearing to establish the lack of due process he alleged.

The ALJ in the state revocation proceedings gave short shrift to his constitutional challenge. He wrote: "[Banister] raises various constitutional law concerns, including the due process provisions of the United States and California constitutions. He asserts there was a 'manifest lack of due process' in the federal proceedings against him. This decision determines no issues of constitutional law. (Cal. Const., art. III, § 3.5.)"

The ALJ concluded: "Taking into account the board's duty to protect the public, the disciplinary guidelines, the conduct that led to his disbarment from practice before the Internal Revenue Service, and his lack of mitigation, revocation of [Banister's] certified public accountant certificate is appropriate." The Board adopted the decision as its order.

Record of the Mandate Proceedings

On March 27, 2007, Banister filed a petition for a writ of mandate challenging the Board's decision. He alleged that the Board improperly relied on IRS proceedings that "violated the Federal Constitution" and "failed to consider due process issues." As for relief, Banister "prays this Court resolve all legal issues, including all Constitutional issues, and remand this proceeding to conduct a hearing in which Banister is allowed to cross-examine his accusers, examine the underlying merits of the alleged improper conduct and present witnesses in his own defense."

In a memorandum in support of his petition, he further asserted that in the IRS proceedings, he was denied the right to conduct discovery, the right to testify under oath on his own behalf, the opportunity to present witnesses, the opportunity to issue subpoenas, the right to fully cross-examine his accusers, and the right to oral argument.

Banister did not augment the record with any evidence of due process violations. Rather, he argued the IRS disbarment could not be considered unless the ALJ in the California proceedings first conducted an independent review of the record of the proceedings to ascertain whether any of his rights to due process had been violated. The trial court denied the petition, incorporating his oral decision at the hearing.

The court explained: "There is no dispute here that the action for which he was suspended in the IRS is substantially related to the qualifications, functions, and duties of a certified public accountant. This Court recognizes that there's a property interest there which

gives rise to due process . . . ." Nevertheless, the court concluded that the petition was, in effect, a collateral attack on the IRS decision. The court held that Banister's remedy for any due process violation was to appeal the IRS decision.

The court also offered an alternative rationale. Although it relied on its collateral attack analysis, it pointed out: "There isn't automatically a right to evidentiary hearing where all the witnesses are called. It's a streamline proceedings [*sic*] and especially in those instances where the summary judgment is dominantly an issue of law based on facts that are fundamentally beyond dispute. [¶] That's not the basis of my decision, but I observe that in the sense that even if I was correct, I don't see the inherent on the surface due process violation that the petitioner is urging on me." Banister appeals.

DISCUSSION

I

Our first formidable task is to decipher Banister's arguments. He argues subdivision (h) requires that before the Board could rely on the IRS proceedings as evidence to revoke his license, it was required to determine that the proceedings comported with the due process protections he would receive in a California proceeding; the Board's failure to examine the due process accorded him by the IRS constitutes an unconstitutional application of subdivision (h). But incongruously, he also argues that the use of the prior administrative decision raises an evidentiary, not a constitutional, issue.

His words are vague and ambiguous. At one point he formulates the question as follows: "[W]hether the Board can revoke Banister's license to practice based solely on the decision of another agency when the other agency did not provide any meaningful due process before rendering its decision. By basing its actions solely on the actions of another agency that failed to provide due process, the Board revoked a constitutionally protected property right without the accused receiving meaningful due process and based its actions on untested assumptions."[3]

He condemns the Board's "pernicious variant of '*per se* liability' in licensure proceedings – a specie of strict liability completely at odds with fundamental due process . . . ." Aligned with this ostensible challenge to the constitutionality of the Board's application of subdivision (h) is yet another iteration of the issue in his opening brief: "The Board's proceeding involved a property right and Banister sought to consider whether the procedure the IRS used to determine Banister's continued eligibility to the privilege to practice before the IRS sufficiently complied with due process such that Banister's California property rights were adequately protected by the IRS procedure."

But in reply to the Board's argument that the utter failure to present evidence he had been denied due process was fatal to his appeal, Banister insists that

---

[3] There is no evidence in the record to support Banister's naked charge that "the other agency did not provide any meaningful due process." And the "untested assumptions" to which he refers are his own admissions, all of which we discuss below.

'[a]s long as the [Board] ALJ considered § 5100(h) to be a '*per se*' rule and impervious to attack, the entire issue was a pure question of law and was preserved for appeal through exhaustive briefing and discussion." He insists that by failing to address the issue, the Attorney General has conceded that the denial of his "request for an evidentiary hearing challenging the trustworthiness of the Internal Revenue Service . . . determination on due process grounds, constituted an evidentiary question rather than a constitutional determination . . . ."

It is possible that Banister's concern with the limitations imposed by article III, section 3.5 of the California Constitution led him to state his due process claim in deliberately vague terms. Article III, section 3.5 prohibits an administrative agency from declaring a statute unconstitutional. The Board ALJ reminded the parties of this constitutional limitation and asked them to address the ban in their closing written briefs. The ALJ ultimately concluded that the decision determined no constitutional issues. No matter how Banister's due process claim is characterized, we agree that in light of his admissions before the IRS, he raises no viable constitutional issues. Subdivision (h) is constitutional and its language does not support the relief Banister seeks. The logic of a federal case on which he relies heavily cannot be applied to the present facts. And most importantly, the record provides no evidentiary support for his due process claim.

II

A. Banister's Admissions and the Summary Judgment

According to the ALJ in the IRS proceedings, Banister admitted the underlying conduct alleged in the IRS accusation, and on that basis, the ALJ granted summary judgment. The special counsel to the Secretary of the Treasury affirmed the propriety of granting a summary judgment in the absence of triable issues of fact.

Banister complains he was not provided a hearing, was not allowed to testify, and was not allowed to confront witnesses, but he never acknowledges that the reason for those deprivations was not an arbitrary policy of the IRS or a capricious denial of his right to due process but the granting of the summary judgment motion based on his own admissions. He does not dispute the dispositive fact that he admitted advising taxpayers not to report income on their federal tax returns in derogation of established law. He simply does not confront the issue that it was the summary judgment that rendered a hearing on his liability unnecessary.

B. Subdivision (h) is Constitutional

The constitutionality of subdivision (h) was upheld in a case similar to the present one. Kenneth Clare appealed the denial of his petition for a writ of mandate challenging the Board's suspension of his accountant's license based solely on the earlier suspension by the Federal Home Loan Bank Board. (*Clare, supra*, 10 Cal.App.4th at pp. 297-298; Bus. &

Prof. Code, § 5100, former subd. (g).)[4] On appeal, he argued that subdivision (h) was unconstitutional because it facially permits discipline "without regard to whether the federal suspension was related to his qualifications, functions, or duties as a certified public accountant." (*Clare*, at p. 301.)

The Fourth District Court of Appeal rejected Clare's constitutional challenge to the statute on multiple grounds. First, the court concluded there was an implicit requirement to demonstrate a "substantial relationship" between the conduct meriting discipline and the professional's fitness or competence to practice that profession. (*Clare*, *supra*, 10 Cal.App.4th at p. 304.) With that limitation, the statute could only be applied to those circumstances that are constitutionally valid. (*Ibid.*) The facial attack on the constitutionality of the statute failed.

Second, the court rejected Clare's claim that the statute was unconstitutional because it established an irrebuttable presumption that any government agency discipline was related to an accountant's qualifications, functions, or duties. The court held that because a finding of a "substantial relationship" was required, the statute did not create such a presumption. (*Clare*, *supra*, 10 Cal.App.4th at p. 304.)

Third, the court was not troubled by different standards of proof or different accounting standards. The court wrote: "We see no merit in this contention,

---

[4] Business and Professions Code section 5100, former subdivision (g) was a predecessor to what is now subdivision (h). We will refer to the prior subdivision (g) as subdivision (h).

since the Legislature presumably was cognizant of actual or potential differing standards of proof applied by various governmental agencies when it adopted [the] subdivision. . . . [¶] . . . [¶] . . . [B]y adoption of subdivision (g) allowing the [Board] to discipline an accountant based upon discipline imposed by other governmental bodies or agencies, the Legislature must have intended to allow the [Board] the power to discipline accountants for actions which violate professional standards regulating conduct of licensees in other jurisdictions even where they would not have directly violated California's own rules. We do not believe it unreasonable for this state to rely on a licensee's failure to conform to professional conduct regulations imposed by, and voluntarily assumed in other jurisdictions." (*Clare, supra*, 10 Cal.App.4th at p. 305.)

Fourth, the court found subdivision (h) was not unconstitutionally vague as applied to Clare's misconduct. An accountant has a responsibility to be aware of and comply with the rules of practice in other jurisdictions before which he or she practices. "Subdivision [h] clearly states that a suspension by a governmental agency is grounds for disciplinary action by the [Board]. Although Clare asserts he did not know he could have been disciplined by the [Board] as a result of the [earlier] suspension, any subjective unawareness could not have been based on ambiguity in the statute." (*Clare, supra,* 10 Cal.App.4th at p. 306.)

Fifth, the court concluded there was substantial evidence to support the constitutional application of the statute to Clare. Like Banister, Clare had admitted the underlying conduct that led to his

suspension. The court found the conduct "clearly is related to his functions or duties as an accountant, as the conduct occurred in the performance of his duties as an accountant for Sun." (*Clare*, *supra*, 10 Cal.App.4th at p. 307.)

Undeterred by a decision expressly upholding the constitutionality of subdivision (h), Banister tries to use Clare to his advantage. He points to the court's willingness to imply a legislative intent not found in the express terms of the statute in order to save it. In similar fashion, he posits that the Legislature must have intended that the Board would scrutinize other governmental agency proceedings to assure they comported with the due process expectations of California licensees. There are no cases to support the imposition of such an expansive sua sponte obligation on the Board. But more to the point, neither the language of the statute nor the dearth of evidence presented in this record justifies such an expansion here.

C. The Express Language of Subdivision (h)

Banister's invitation to imply a duty glosses over the most basic rules of statutory construction. We are constrained by the express language of the statute, and we remind Banister that the plain meaning of the words of the statute does not require the Board to independently review prior proceedings to determine whether a licensee was afforded due process, as that concept is understood in California revocation proceedings. Thus, subdivision (h) itself presents a barrier to the relief he seeks.

D. A False Analogy

Faced with a constitutional statute that does not compel the Board to undertake a sua sponte examination of the IRS proceedings and no cases to support his novel interpretation of the statute, Banister asks us to apply the logic of a federal deportation case (*United States v. Mendoza-Lopez* (1987) 481 U.S. 828 [95 L.Ed.2d 772] (*Mendoza-Lopez*)) in which the court held that, in the absence of any other avenue for judicial review of an earlier deportation proceeding, an alien who was prosecuted for reentering the country could collaterally attack the proceeding. The attempt to apply such a faulty analogy only highlights the chasm between what the law is and what he would like it to be.

We need not point out each of the glaring differences between the federal deportation proceedings and the earlier misdemeanor prosecution because the linchpin of the analysis rested on the lack of judicial review available to the deportee. (*Mendoza-Lopez*, *supra*, 481 U.S. at pp. 837-839.) Here, as the Board aptly points out, Banister exercised his right to administrative review and assured us he would seek judicial review by the June 2010 deadline. Whatever the motivation for his delay in seeking review of the IRS decision, the fact remains that, unlike Mr. Mendoza, Banister had the right to obtain judicial review of the administrative decision.

Moreover, there is a second critical distinction. In *Mendoza-Lopez*, the courts assumed that the deportation hearing violated due process. (*Mendoza-Lopez*, *supra*, 481 U.S. at pp. 839-840.) Here no court or administrative agency has made that assumption.

Nor should they. Factually, the case bears no resemblance to Banister's administrative proceedings. This record is barren of any evidence comparable to the violations suffered by Mendoza-Lopez, an illegal immigrant. Consequently, a deportation case that is predicated on the deprivation of due process does not support a new rule triggering a sua sponte search for deprivations without evidence that such deprivations actually occurred.

E. The Record

An appellant bears the burden of producing a sufficient record to support his or her claims. Unfortunately, the record we have is quite skimpy. Because Banister has failed to include many of the documents from the IRS proceedings, including his answer, we do not have the actual record of his admissions. We do have, however, the special counsel's exhaustive recitation of the chronology of the case, including the motions and the rulings by the IRS ALJ. The Special Counsel quotes the ALJ verbatim that Banister had admitted the underlying conduct.

Banister does not dispute he admitted the conduct alleged in the accusation, but he objects to the characterization of the conduct as "'misconduct before the I.R.S.,'" and he insists that using his admissions "is nothing more than circular reasoning." In the absence of the record of his actual admissions, he simply has not sustained his burden on appeal. Moreover, the reasoning is linear, not circular. It begins with the factual predicate that Banister admitted the alleged conduct. Based on that pivotal premise, further testimony about Banister's or his former IRS employers' or other witnesses' motives was immaterial.

The conclusion, therefore, was straightforward – there were no material triable issues of fact.

Banister cites to argument of his counsel as support in the record for his contention that he was denied due process. But argument at any of the proceedings does not constitute evidence. We can find no evidence in this record that he was denied due process.

Indeed, the record we have suggests just the opposite. Although the ALJ granted the summary judgment as to liability, Banister was provided a hearing to determine what penalty would be appropriate. The judge went to great lengths in that hearing to accommodate his Fifth Amendment rights and allowed him to testify while not under oath and not subject to cross-examination. He was allowed to testify and to cross-examine the government's witness. He thereafter appealed the determination. He recognized he had a further right of appeal he had yet to exercise. Thus, having scoured the record we were provided, we can find no evidence to support his due process claim.

He offers yet another excuse for his failure to produce a prima facie showing he was denied due process. He argues that he would have presented evidence if only he had been given an evidentiary hearing. But in his view, the threshold question was a matter of law, and that question, whether the Board must review the IRS proceedings to determine whether he was provided his right to due process, had to be resolved before any evidentiary issues. He asks us to remand the case for an evidentiary hearing after resolving the legal question in his favor. But he insists that the Board erred as a matter of law by relying on

an IRS determination that is untrustworthy because the proceedings failed to provide due process.

Banister's analytic approach is clever but wrong: clever in that he tries to escape the fatal consequences of providing no evidence by characterizing the threshold issue as a question of law, but wrong because an appellate court does not rule on abstract questions. He invites us to conclude the statute was unconstitutional as applied based on no evidence it was applied unconstitutionally.

Yet in analogous cases, both the federal and California courts require the party challenging the prior administrative proceedings to prove he was deprived of due process and that the deprivation prejudiced him. In federal bar proceedings based on discipline imposed by a state bar, courts impose the burden on the attorney to establish, by clear and convincing evidence, any due process violation alleged to have occurred during the state administrative proceedings. (*Gadda v. Ashcroft* (9th Cir. 2004) 377 F.3d 934, 943; *In re Kramer* (9th Cir. 2002) 282 F.3d 721, 724-725.) In those rare federal cases in which a collateral attack is condoned, federal courts have required the defendant to prove a violation of due process and prejudice. (*United States v. Torres* (3d Cir. 2004) 383 F.3d 92, 103; *United States v. Arevalo-Tavares* (10th Cir. 2000) 210 F.3d 1198, 1200.) California is as reticent to allow a collateral attack of prior conviction allegations, but when allowed, the defendant bears the burden of producing evidence of the violation and, in addition, of showing he suffered prejudice as a result. (*People v. Allen* (1999) 21 Cal.4th 424, 435-436.)

Rather than evidence, Banister presents wild hypotheticals. Below he speculated about due process in Rwanda; now he raises the possibility that fanatic Islamists would ban female witnesses. Neither hypothetical is factually supported, of course. But Banister's resort to hypotheticals instead of evidence is telling. His appeal masquerades as a question of law when it is nothing more than an abstraction.

Kenneth Clare attempted the same thing and lost. He suggested that a foreign jurisdiction might suspend a license on the basis of race. The court rejected the notion, as do we, that the existence of some hypothetical situation in which the statute might be unconstitutional as applied was not sufficient to invalidate the statute. (*Clare*, *supra*, 10 Cal.App.4th at pp. 303-304.)

In sum, we reject Banister's contention that he must do no more than raise the specter of due process to trigger an obligation on the Board to independently scrutinize the entire administrative record from the prior proceeding. This contention, as pointed out, is unsupported. There is no law and no evidence to support it. In the end, the blurring of the constitutional and evidentiary arguments was for naught. In the absence of some evidence he was denied due process and that he suffered prejudice as a result, the Board had no sua sponte obligation to hunt for evidence, and we have no opportunity to consider whether a revocation based on subdivision (h) can be set aside for egregious violations of due process in the underlying administrative proceedings.

DISPOSITION

The judgment is affirmed.

RAYE, Acting P. J.

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.

APPENDIX B

EDMUND G. BROWN JR.
Attorney General of the State of California
WILBERT E. BENNETT, State Bar No. 51966
Supervising Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 622-2134
Fax: (510) 622-2270

Attorneys for Respondent
California Board of Accountancy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

No. 07-CS-00379
Judge: Hon. Lloyd Connelly

[Filed January 8, 2009]

JOSEPH R. BANISTER,

Petitioner,

v.

CALIFORNIA BOARD OF ACCOUNTANCY,

Respondent.

JUDGMENT DENYING PEREMPTORY WRIT OF MANDAMUS

This matter came on regularly for hearing on a petition for writ of administrative mandamus on December 5, 2008, in Department 33, the Honorable Lloyd Connelly presiding. Robert E. Barnes appeared as attorney for petitioner, Joseph R. Banister. Supervising Deputy Attorney General Wilbert E Bennett appeared as attorney for respondent, California Board of Accountancy. The record of the administrative proceedings having been received into evidence and examined by the court, no additional evidence having been received by the court, and arguments having been presented, [handwritten: the court orally announced its decision to deny the petition. The transcript of the court's oral decision at the hearing is incorporated herein by reference. LC]

IT IS ORDERED THAT:

1. The petition for a peremptory writ of mandamus is denied; and

2. Respondent shall recover its costs in this action in the amount of $_____, to be determined upon the filing of a memorandum of costs. [handwritten: pursuant to Government Code section 6103.5 and rule 3.1700 of the California Rules of Court. LC]

DATED: JAN 8 2009

[Seal] /s/ Lloyd Connelly
HONORABLE LLOYD CONNELLY
Judge of the Superior Court of California,
County of Sacramento

APPROVED AS TO FORM.

DATED: _____

_____
ROBERT E. BARNES
Attorney for Petitioner

90100453.wpd
SF2007900159

DECLARATION OF SERVICE
(AG Mailroom)

Case Name: **Joseph R. Banister v. California Board of Accountancy**

Case No. **Sacramento County Superior Court No. 07-CS-00379**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 23, 2008, I served the attached **[Proposed] Judgment Denying Peremptory Writ of Mandamus** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1515 Clay Street, 20th Floor, P.O. Box 70550, Oakland, CA 94612-0550 addressed as follows:

ROBERT E. BARNES, ESQ.
Law Office of Robert G. Bernhoft, S.C.
207 E. Buffalo Street, Suite 600

Milwaukee, Wisconsin 53202

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 23, 2008, at Oakland, California.

Cheryl Branin	/s/ Cheryl Branin
Typed Name	Signature

90101859 wpd

APPENDIX C

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

No. 07CS00379

HON. LLOYD G. CONNELLY, JUDGE,
DEPARTMENT 33

[Dated December 5, 2008]

JOSEPH R. BANISTER,	)
	)
Petitioner,	)
	)
vs.	)
	)
CALIFORNIA BOARD OF ACCOUNTANCY,	)
	)
Respondent.	)
	)

--oOo--

REPORTER'S TRANSCRIPT OF PROCEEDINGS

--oOo--

FRIDAY, DECEMBER 5, 2008

--oOo--

* * *

[p.17]

* * *

THE COURT: Thank you, sir. The matter is submitted and I am prepared to rule. I am going to deny the petition. I have concerns as I have articulated here through some of my questions.

Let me just summarize very briefly the background and history which brings us here. The Internal Revenue Service did suspend Mr. Banister's right to practice on cases involving the Internal Revenue Service.

They did so after they concluded in part that he was providing information that was clearly incorrect, which was virtually universally known to be incorrect in the profession, and they promulgated a rather lengthy decision in that regard which the Court will make reference to later.

I thought it might have an easy decision number and it doesn't, but it's not necessary.

The Board of Accountancy here in California interestingly enough learned about this action by the IRS based on a renewal application that Mr. Banister filed and he forthrightly disclosed the suspension. The administrative staff at the Board caught it, procured the federal action or information about the federal action and then initiated and revoked his California license under 5100 H of the Business and Professions Code.

There is no dispute here that the action for which he was suspended in the IRS is substantially related to the qualifications, functions, and duties of a certified public

[p.18]

accountant. This Court recognizes that there's a property interest there which gives rise to due process, and then I join the issue before me.

The petitioner would like to, from the Court's perspective collaterally attack the decision of the Internal Revenue Service in effect requiring the Board of Accountancy by order of this Court to evaluate the trustworthiness of the IRS decision. The failure or lack of compliance with due process in the context of that decision.

Fundamentally, the case is made by the petitioner out of this Mendoza/Lopez case which involves deportation. It is really not related by facts to this, but in that instance it allowed a collateral attack of a prior proceeding to be made by the person who is about to be deported the second time, and that case has been followed and there has been a lot of law arising out of that case not just in immigration but in other areas.

That case was subsequently codified at least in the deportation context under 1326 (d) 2003, and there is a lot of case law as it discussed what, if any, conditions have to be met prior to initiating that type of collateral attack.

This Unzueta case, U-n-z-u-e-t-a, which I cited earlier and which was brought to my attention actually

about the petitioner has a good summary of the case law in that area with regard to whether or not there is an opportunity for direct judicial review, that being a

[p.19]

condition precedent in effect to a collateral attack.

There are other elements there, fundamental unfairness, what have you. You are required to have all three. One which the petitioner is missing in this instance at least under the federal standard, as I understand it, is that he has a right to judicial review which still exists.

He has not exercised it. He has advised me that he's going to, that alleges some of the -- and orally here that he tells me will allege some of the same failings as he sees them that he has identified in the IRS decision.

He has a remedy there, that's where the remedy is. The remedy is not in a separate different forum with regard to that decision.

He has to go to the appropriate Federal Court in this instance to review the IRS decision. I looked at it also under the California law and fundamental law there is that you can't collaterally attack a decision which the other tribunal had fundamental jurisdiction, proper jurisdiction over the parties and subject matter, and obviously there is really no dispute that the IRS has that in this instance.

The argument to the analogy that it could be a foreign country and Rwanda is intriguing and may raise some issues in the context of those facts in that

situation, but here it's a department of the United States federal government, the Internal Revenue Service.

It is an appropriate entity certainly within the

[p.20]

context of what's envisaged under 5100. Given that case, the fact from the Court's perspective, there is simply no basis for a collateral attack from this court through the Board of Accountancy upon the IRS determination. When you look at these two together, it makes sense because obviously he has a effective and appropriate remedy.

As to the issue of timeliness that they have a period of six years to file a case and of course subsequent to that there would be potential other delays that could extend for a substantial period of time.

There is no obligation to wait. You have to look at these enforcement codes as a whole. It is about protecting the public's interest. There's a problem there, I would make the argument that the agency has the obligation just the other way to move in a timely fashion and not be depended upon some separate statutory limitation period in another jurisdiction.

Now, even if I am wrong, I am just going to observe, this is not the basis of my decision. The basis of my decision is what I articulated here. I spent a little time with this federal decision, and this is made on a motion for summary judgment, and the comments as I read them in whole is that in the context of this type of hearing, that occurred at the federal level not unlike

a motion for summary judgment here in the State of California.

There isn't automatically a right to evidentiary hearing where all the witnesses are called. It's a streamline proceedings and especially in those instances

[p.21]

where the summary judgment is dominantly an issue of law based on facts that are fundamentally beyond dispute.

That's not the basis of my decision, but I observe that in the sense that even if I was correct, I don't see the inherent on the surface due process violation that the petitioner is urging on me.

I do, therefore, deny the petition.

* * *

[Tr. of Hearing, December 5, 2008, p. 17, line 2 through p. 21, line 7.]

APPENDIX D

IN THE SUPREME COURT OF CALIFORNIA

S187914
Court of Appeal, Third Appellate District – No. C062435

En Banc

[Filed December 15, 2010]

JOSEPH R. BANISTER,	)
	)
Plaintiff and Appellant,	)
	)
v.	)
	)
CALIFORNIA BOARD OF ACCOUNTANCY,	)
	)
Defendant and Respondent.	)
	)

The petition for review is denied

GEORGE
Chief Justice

APPENDIX E

BEFORE THE
CALIFORNIA BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

Case No. AC-2005-22
OAH No. N2006050891

[Filed January 26, 2007]

In the Matter of the Accusation Against:	)
	)
JOSEPH R. BANISTER	)
	)
Certified Public Accountant No. CPA 57875	)
	)
Respondent.	)
	)

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the BOARD OF ACCOUNTANCY as its Decision in the above-entitled matter.

This Decision shall become effective on February 25, 2007.

IT IS SO ORDERED January 26, 2007.

/s/ _____

OAH 15 (Rev. 6/84)

APPENDIX F

BEFORE THE
CALIFORNIA BOARD OF ACCOUNTANCY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

Case No. AC-2005-22
OAH No. N2006050891

[Dated November 21, 2006]

In the Matter of the Accusation Against:	)
	)
JOSEPH R. BANISTER	)
	)
Certified Public Accountant No. CPA 57875	)
	)
Respondent.	)
	)

PROPOSED DECISION

Administrative Law Judge Steven C. Owyang, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on July 6, 2006.

Deputy Attorney General Jeanne C. Werner represented complainant Carol Sigmann, Executive Officer, California Board of Accountancy, Department of Consumer Affairs.

Respondent Joseph R. Banister was present and represented by Robert E. Barnes, Law Office of Robert G. Bernhoft, Milwaukee, Wisconsin.

Simultaneous opening and reply briefs were timely filed. The matter was submitted on October 11, 2006.

FACTUAL FINDINGS

1. Complainant Carol Sigmann, Executive Officer, California Board of Accountancy, Department of Consumer Affairs, issued the accusation in her official capacity. At hearing, complainant withdrew paragraphs 11 and 12 of the accusation, which had alleged cause for discipline under Business and Professions Code section 5100, subdivision (g). The remaining alleged cause for discipline was pursuant to Business and Professions Code section 5100, subdivision (h).

2. On February 1, 1991, the California Board of Accountancy issued Certified Public Accountant Number CPA 57875 to respondent Joseph R. Banister. During the period March 1, 1997, through June 17, 1999, respondent's certified public accountant certificate was renewed in an "inactive" status. Otherwise, the certificate was in full force and effect and was renewed through February 28, 2005.

3. The United States Department of Treasury and the Internal Revenue Service are governmental bodies or agencies within the meaning of Business and Professions Code section 5100, subdivision (h).

4. On December 24, 2003, a decision in United States Department of Treasury Complaint No. 2003-2,

Director, Office of Professional Responsibility v. Joseph R. Banister, ordered respondent disbarred from practice before the Internal Revenue Service. Respondent appealed the decision. In a June 25, 2004 decision, the Department of Treasury denied respondent's appeal and adopted as its final agency action the underlying decision disbarring respondent from practice before the Internal Revenue Service.

5. The Department of Treasury found that respondent provided erroneous advice to taxpayers, including improperly advising them that tax returns were not required because Internal Revenue Code sections 861 though 865 define "source of income" in a manner that excluded the income of United States citizens residing in the United States from United States tax.

6. The Department of Treasury decision, quoting the underlying decision, states:

> In fact, in [respondent's] answer to the original Complaint he *admitted* that the facts alleged in the Complaint occurred. Thus, [respondent] *admitted* that he so advised his client "C" that the Sixteenth Amendment to the United States Constitution was not ratified and he *admitted* that he advised client "C" that Internal Revenue Code sections 861 through 865 defined "source of income" so as to exclude C's earnings. Similarly, [respondent] *admitted* that he also advised client "T" that Internal Revenue Code sections 861 though 865 defined "source of income" so as to exclude T's earnings. The very significant problem with [respondent's] advice is that it is absolutely wrong. Both of

> [respondent's] assertions have been long resolved by the Federal Courts as completely without merit. Thus, [respondent] was not presenting some new theory in support of the dream entertained by some United States citizens that somehow they don't have to pay their federal income taxes. In fact, [respondent's] assertions have been addressed by so many federal courts that they are no longer accorded the dignity of repeating the explanations as to why the claims are meritless. [Emphasis in original.]

7. Respondent's disbarment from practice before the Internal Revenue Service was pursuant to Part 10 of Title 31, Code of Federal Regulations (sometimes known as "Treasury Circular 230"). Respondent's practice before the Internal Revenue Service constituted the practice of public accountancy within the meaning of Business and Professions Code section 5051.

8. Respondent made no showing of rehabilitation or mitigation, demonstrated no remorse, and acknowledged no wrongdoing.

9. Respondent has resided in Minden, Nevada, since January 2006. Respondent practices "reconstructive accounting" working with individuals who have not kept records over a period of time. Respondent has clients all over the country.

10. Respondent's California license has not been the subject of prior discipline and complainant has not shown evidence of other professional misconduct by respondent.

11. Complainant seeks reimbursement of its costs of investigation and prosecution of this matter. Complainant has certified $1,656.52 in investigative costs and $4,972.25 in Attorney General costs, for a total of $6,628.77. These costs are reasonable.

LEGAL CONCLUSIONS

1. In its June 25, 2004 decision, the Department of Treasury disbarred respondent from practice before the Internal Revenue Service. (Factual Finding 4.) Complainant asserts that, by reason of the Department of Treasury decision, respondent's certified public accountant certificate may be suspended or revoked pursuant to Business and Professions Code section 5100, subdivision (h), which provides as a cause for discipline:

> Suspension or revocation of the right to practice before any governmental body or agency.

Respondent's disbarment from practice before the Internal Revenue Service was pursuant to Part 10 of Title 31, Code of Federal Regulations (sometimes known as "Treasury Circular 230") which provides, in pertinent part:

> This part contains rules governing the recognition of attorneys, **certified public accountants**, enrolled agents, and other persons **representing clients before the Internal Revenue Service**. Subpart A of this part sets forth rules relating to the **authority to practice** before the Internal Revenue Service; subpart B of this part prescribes the duties and restrictions relating to such practice;

> subpart C of this part contains rules relating to disciplinary proceedings. [Emphasis added.]

Respondent's practice before the Internal Revenue Service constituted the practice of public accountancy within the meaning of Business and Professions Code section 5051. There is a substantial relationship between respondent's practice before the Internal Revenue Service and his qualifications, functions and duties as a California certified public accountant. (*Clare v. State Bd. of Accountancy* (1992) 10 Cal.App.4th 294.) Respondent's disbarment from practice before the Internal Revenue Service constitutes the "[s]uspension or revocation of the right to practice" before a governmental body or agency and provides cause for discipline under Business and Professions Code section 5100, subdivision (h).

2. Respondent asserts that the Legislature "noticeably distinguished" the suspension of the "*right to practice* before any governmental body or agency" (Bus. & Prof. Code, § 5100, subd. (h), emphasis added) from the suspension of the "*authority to practice* as a certified public accountant . . . by a state or foreign country" (Bus. & Prof. Code, § 5100, subd. (d), emphasis added). Respondent argues:

> As important, the state legislature chose not to authorize discipline merely for a govermnental body prohibiting someone from practicing before them unless that governmental body was either an accounting licensing entity (such as a state or foreign nation), or, if neither, then suspension only constituted grounds for discipline if the governmental agency provided a "right to practice" to the person disciplined.

> The "right to practice" has always been defined in California as when a government agency gives someone a property interest in practicing a particular profession. [Emphasis in original.]

Complainant agrees that the right to practice accountancy in California concerns a vested property right. Respondent has not shown, however, that section 5100, subdivision (h), has the restricted application that respondent posits, notwithstanding the distinction between "right to practice" and "authority to practice." The plain language of subdivision (h) contradicts respondent's assertion. Nor has respondent cited legislative history or case law to the contrary.

3. Respondent raises various constitutional law concerns, including the due process provisions of the United States and California constitutions. He asserts there was a "manifest lack of due process" in the federal proceedings against him. This decision determines no issues of constitutional law. (Cal. Const., art. III, § 3.5.)

4. Complainant urges that respondent's certified public accountant certificate should be revoked. Respondent counters, "Given the respondent's well-founded belief the IRS action was rooted in his whistle-blowing activities from his former employment with the IRS, vindicated by his complete acquittal at a real trial on the facts, discipline, even if appropriate at all, should not be severe." Respondent made no showing of his asserted "whistle-blowing activities" or "complete acquittal."

"Protection of the public shall be the highest priority for the California Board of Accountancy in exercising its licensing, regulatory, and disciplinary functions." (Bus. & Prof. Code, § 5000.1.) The board's disciplinary guidelines (Cal. Code Regs., tit. 16, § 98) list several aggravating factors to be considered regarding the nature of discipline that should be imposed, including: evidence that the violation was knowingly committed and/or was premeditated; licensee's actions resulted in financial damage to his or her clients or other consumers; duration of violations; and, evidence that the licensee knew or should have known that his or her actions could harm his or her clients or other consumers. Respondent's disbarment from practice before the Internal Revenue Service (Factual Findings 4, 5, 6, 7) demonstrated that he knowingly provided incorrect advice, that he did so on more than one occasion, and that he knew or should have known that his actions could harm his clients.

The disciplinary guidelines also recognize a number of mitigating factors, including: that the licensee has cooperated with the board's investigation and other law enforcement or regulatory agencies; the passage of considerable time since an act of professional misconduct occurred with no evidence of recurrence or evidence of any other professional misconduct; convincing proof of rehabilitation; demonstration of remorse by the licensee; recognition by licensee of his or her wrongdoing and demonstration of corrective action to prevent recurrence; and correction of the violation without monetary losses to consumers and/or restitution was made in full. Respondent protests that he had no notice that mitigation was at issue until complainant raised it in closing argument; mitigation is always at issue in disciplinary proceedings before

the board. Respondent asserts, and complainant acknowledges, that he self-reported his disbarment from practice before the IRS. It is noted, further, that there is no evidence of other professional misconduct by respondent. Other than this, respondent made no showing of rehabilitation or mitigation, demonstrated no remorse, and acknowledged no wrongdoing.

Taking into account the board's duty to protect the public, the disciplinary guidelines, the conduct that led to his disbarment from practice before the Internal Revenue Service, and his lack of mitigation, revocation of respondent's certified public accountant certificate is appropriate.

5. Complainant shall recover her costs of investigation and prosecution in this matter, in the amount of $6,628.77. (Bus. & Prof. Code, § 5107.)

ORDER

1. Certified Public Accountant Number CPA 57875, issued to respondent Joseph R. Banister, is revoked.

2. Respondent shall reimburse the board its costs of investigation and prosecution in this matter, in the amount of $6,628.77.

DATED: November 21, 2006

/s/Steven C. Owyang
STEVEN C. OWYANG
Administrative Law Judge
Office of Administrative Hearings